

## Introduction

### 1.1 THE PUBLIC FACE OF CONSTITUTION-MAKING

In the final months of 1995, about one-third of South Africans encountered an interesting full page advertisement in a newspaper or magazine. It was a picture of President Nelson Mandela standing on a pavement outside a building, dressed in a suit, and talking on a cellular phone. The speech bubble above his head read, “Hello, is that the Constitutional Talk-line? I would like to make my submission” (Everatt et al., 1996, 156; Segal and Cort, 2011). This advertisement was part of a large campaign to encourage South Africans to participate in the constitution-making process. The central message was that South Africans of any background, level of education or income could meaningfully contribute to the drafting of the constitution. It intimated that their participation was wanted, and that participation was easy. This message was buttressed by the publication of comic strips that illustrated the constitution-making process and the content of the constitution, and TV and radio programs that brought the development of the constitution into the living rooms, minibuses, and cars of the “rainbow nation.” By the time the final constitution was completed in 1996, more than 1.5 million South Africans had participated in some way and cemented the place of South Africa’s constitution as a guiding example to the world.

My own interest in citizen participation in constitution-making processes was first piqued when I learned about the Constitutional Loya Jirga that took place in Afghanistan between late 2003 and early 2004. Here, it seemed, was a traditional way in which citizens could participate in deliberations about the content of a constitution. The reality of course was somewhat different. Concerns were raised very early in the process about the extent to which the Loya Jirga could alter a draft that had already been prepared in a way that satisfied both President Karzai and the United States government (International Crisis Group, 2003). The final text of the constitution was a carefully balanced path between the various red lines of the international community, Islamist leaders, and various other power-brokers (Rubin, 2004). Nonetheless, the romantic image of the restoration of a traditional

form of democratic participation as a war-torn state moved along the path toward reconstruction is a powerful one.

Participatory constitution-making processes are hardly uncommon, popping up in such unlikely places as the example from Afghanistan described earlier, and having early historical examples in revolutionary France (1793) and in the erstwhile Batavian Republic (1797). Indeed, it is one of the great impulses of the current age to seek to solve thorny problems by consulting the people afresh. And what could be more inspiring for a student of politics and constitutional change than a story about the mass public coming together to deliberate about the fundamental institutions that will govern their community. Normatively, this kind of democratic negotiation of the social contract is highly appealing. For me, though, accounts of public participation in constitution-making processes from Albania to Zimbabwe are for the most part unsatisfying in that they fail to account for the extent to which input from the public is included in the final constitutional text. One of the purposes of this book is to provide an account of three such inspiring cases in which this vital outcome is accounted for.

This heady mixture of hopeful innovation and mass-public mobilization practically writes its own advertising, and the message from Nelson Mandela described earlier is hardly an exception. As we begin to wade into these potentially muddy waters, this public face of participatory constitution-making is worth thinking about for a minute. The broader advertising slogan of the South African Constitutional Assembly was: “You’ve made your mark, now have your say.” Later followed by advertising that seemed to promise that this participation would be effectual, as it read: “You’ve made your mark. You’ve had your say. Now we’re making sure it counts” (Segal and Cort, 2011, 163). In Brazil, documents produced by the Constituent Assembly in 1987 suggested: “You too are a member of the constituent assembly, participate!”<sup>1</sup> In 2013, Zimbabwe’s Constitution Parliamentary Committee (COPAC) promised that its participatory drafting process was “Ensuring a people-driven constitution” (Moyo, 2013). Cuba also included popular consultations in their constitutional revision process in 2018–2019, with the main slogan “My will, my constitution,” but also claiming that “The Constitution of a country is the voice of the people” (González, 2019). Each of these slogans and many more besides which I have left out make promises about the constitution-making process. They promise (either implicitly or explicitly) that what is happening in this constitution-making process is a real substantive engagement with the people, in which their views will be taken into account when the drafters put pen to paper. For this social scientist, the last part of the South African slogan in particular seems to raise an empirical challenge, and it is one that I take up with some enthusiasm later in this book.

The title of the book begins to give away its empirical findings and hints at the core thesis. It is of course a reference to Rawls’ famous “veil of ignorance”

<sup>1</sup> Você também é constituinte, participe!

(Rawls, 1971), but this book does not directly deal with Rawls' contribution to political theory. The way Rawls described reasoning about political arrangements from behind a veil, however, has a resonance with how I describe public participation in constitution-making processes. I argue that public participation in a sense creates a veil that separates the citizens from the elites who do the real work of drafting a constitution. Counterintuitively, citizen-participants do some of the work of erecting a barrier that serves in a perverse way to insulate the constitution from public criticism. They weave the curtain that provides the constitution makers with some privacy themselves. Participation legitimates the constitution, providing it with a democratic covering, perhaps regardless of its substantive content.

This claim may require some further justification, in that one would expect that more participation would create more transparency. Indeed, this may sometimes be the case. But in at least two of the cases that are considered in this book, it seems that public participation also endowed the constitution-making processes with a great deal of popular legitimacy and screened the elite negotiations that really mattered from a clear public view. In the case of South Africa, public participation captures the scholarly (and public) mind to a far greater extent than the "channel" that existed between the key negotiators of the African National Congress and the National Party. Similarly in Brazil, the idea of the "citizens' constitution" seems to have a larger place in the popular imagination than the reality of the power brokering of the parliamentary coalition called the "Centrão." These larger-than-life episodes of mass-public involvement in constitution-making have served in some way to block our view of the realpolitik going on in the halls of power. Whether or not this is part of the intention of designers of constitution-making processes I would not venture at this moment to judge, but I return to the larger implications of these question in the conclusion of the book.

In the chapters that follow, I retell the histories of three noteworthy cases of participatory constitution-making (Brazil, South Africa, and Iceland), seeking to provide a clear answer for this motivating question of how much input from the public really changes the content of the constitution. Moreover, I seek to explain the variation in impact, developing an argument about how political parties engage in constitution-making processes. Taking this exploration of participatory constitution-making even further, I delve into the details of sixteen more cases in lesser depth, and also present some statistical tests of the theory I develop in this book. The research presented here has been my occupation for the better part of a decade, and it has been worth every minute.

## 1.2 WHY IS A STUDY OF PARTICIPATION IMPORTANT?

There was a time, not so long ago, when scholars were highly optimistic about the possibility that liberal democracy would spread across most of the globe, bringing peace and prosperity with it (Fukuyama, 1989; Huntington, 1993). More recently,

events in a number of countries have prompted us to question this hopeful vision and think more deeply about the core vulnerabilities of liberal democracies and what might be done to protect them (Ginsburg and Huq, 2018; Graber et al., 2018). Even before this, a number of scholars brought attention to the surprising weakness of public support for democratic institutions (Norris, 2001; Dalton, 2004). Among the pressing challenges to liberal democracy is a longer-term decline in public trust in political institutions (Hetherington, 2005). Much as the coach of a sports team in the middle of a losing streak might emphasize greater attention to the fundamentals, scholars also advise a renewed focus on the foundations of liberal democracy. Ginsburg and Huq (2018, 3) suggest that “it is only the determined mobilization of citizens, political party elites, and officials committed to the rule of law that can preserve those [democratic] institutions and practices.”

In this context, public participation in politics takes on a new urgency. Indeed, the early years of the twenty-first century have witnessed a remarkable spread of innovations in democracy, enabling citizen participation at the local (Baiocchi, 2001), national (Landemore, 2019), and even global level (Dryzek et al., 2011; Global Citizens Assembly, 2019). Public participation in decision-making processes of many kinds seems to have a legitimating effect (Scharpf, 1998; Fung, 2015; Yang, 2016). In particular, increased citizen participation is often seen as having the potential to increase civic virtues and public trust (Grönlund et al., 2010).

Nowhere is public participation seen to be more necessary than in constitution-making processes. Here, the fundamental laws that establish a government are altered or replaced, and a powerful source of legitimation is necessary to ensure public faith in the process and the product. To rationalize the unrestrained power deployed in a constitution-making process, legal scholars appeal to the core concept of constituent power (Kalyvas, 2005; Tushnet, 2015). In modern practice, most significant moves toward constitutional revision or replacement require “legitimation from below” (Oklopcic, 2018, 53), usually through some opportunity for public votes or participation. As Tushnet notes, “at some point in the process of constitution making and implementation, law runs out” (Tushnet, 2015, 641). At this point the “revolutionary road to constitutional legitimacy” must be followed and some form of public participation is often required to legitimate the constitutional change (Tushnet, 2015, 642). In the most romantic version of this legitimating process, citizens are pictured engaging with one another in a wide-ranging debate that gives rise to a “constitutional moment” (Ackerman, 1998, 187).

Indeed, this view of the necessity of public participation in constitution-making processes has a long historical tradition. During the French Revolution, Thomas Paine famously wrote that “The constitution of a country is not the act of its government, but of the people constituting a government” (Paine, 1791, 56). Similarly, von Savigny declared that it is “the spirit of a people [Volkgeist] living and working in common in all the individuals, which gives birth to positive law” (Savigny, 1867, 12).

More recently, in the introduction to a symposium on participatory constitution drafting in the *International Journal of Constitutional Law*, Choudhry and Tushnet (2020, 173) suggest that the currently dominant view is that public participation is “highly desirable” on both normative and pragmatic grounds. The normative claim was given a powerful statement by Hart (2003), who wrote that “How the constitution is made, as well as what it says, matters. Process has become equally as important as the content of the final document for the legitimacy of a new constitution.” Pragmatically, public participation in constitution-making has been connected with improved democracy (Eisenstadt et al., 2017a), resolution of conflict (Widner, 2005), expanded rights protection (Elkins et al., 2008; Negretto, 2020), and empowering women (Hart, 2003; Rubio-Marín, 2020).

In pursuit of these normative and pragmatic goals, public participation in constitution-making has taken many forms. Voting is by far the most common means of participation, either through the election of the drafting body or in a ratifying referendum. Between 1789 and 2016, 168 constitutions were ratified through a referendum, and as of 2018, more than a third of in-force constitutions were ratified through a referendum (Elkins and Hudson, 2019). However, it is becoming more common to involve voters earlier in the process through such means as public consultations, petitions, written and oral submissions, and even popular amendments. Landmore (2020b, 180) elegantly summarized this shift toward earlier and more substantive participation, suggesting that

it appears that our understanding of constitution-making has evolved to now mean having direct influence on the content and shape of the constitutional text itself, as opposed to just performatively bringing a ready-made text into existence or shaping it indirectly via elected representatives. The democratic will now is no longer supposed to exercise itself indirectly and at the end of the process but from the start, throughout, and in more direct ways.

Reflecting the view described by Landmore, public participation programs involving early and substantive mechanisms for public input have become a central part of the guidance given by international organizations advising drafting processes (Ghai and Galli, 2006; Hart, 2010; Gluck and Ballou, 2014), making it “inconceivable that a government would attempt to draft a new constitution without at least a nominal commitment to a process in which the public is consulted” (Kirkby and Murray, 2016). The dominant assumption seems to be that a better, more participatory, process may go some way toward overcoming otherwise suboptimal political conditions.

Despite this increasing participation of the public in constitution-making processes, the extent to which public input has influenced constitutional texts has barely been investigated. There are certainly reasons to believe that one purpose of popular involvement is to increase the legitimacy of the constitution. However, many public outreach programs are pitched in terms of giving the public an

opportunity to contribute to the constitutional text, and perhaps even to assume the role of coauthor with the members of the drafting body. At this point, we do not have a good sense of the degree to which this actually happens. Is there such a thing as a “constitutional moment” in which the People speak about the constitution and effect change therein (Ackerman, 1991)? If so, what conditions might predict greater or lesser probability for effective public input?

### 1.3 WHAT THIS BOOK DOES

Inspired by scenarios like the advertisement featuring Mandela, there are two central questions in this book. They work in order, as the first question is descriptive and the second is inferential.

1. To what extent does public participation in constitution-making processes affect the text of the constitution?
2. What explains the variation in this impact?

Beyond these, there are other questions that are considered along the way. Such as, to what extent can drafters use submissions from the public in an effective way – do logistical or cognitive challenges impair their ability to utilize input from the public? Do citizen-participants have the ability to determine the extent to which public input was effective? Does participation increase the legitimacy of the constitution? If so, for how long? And finally, what sort of guidance can we give to designers of constitution-making processes about how best to implement a public participation program.

The theoretical contribution of this book is an application of established understandings of how political parties function to a new setting, and a correction to both the popular mythology of constitution-making and the guidance often given by international organizations. Chapter 2 discusses the theory in some depth and situates it within the literature in political science and law. To briefly state the theory, I propose that the impact of public participation in constitution-making processes varies across cases, and that the variation is determined primarily by the strength of the political parties in the drafting body. Specifically, stronger parties are less likely to include input from the public in the constitutions that they produce, while weak parties are more exposed to public pressure, and thus include more content from the public. In the rare case where a constitution is drafted without the participation of political parties, the impact of public participation is strongest. To be sure, there are many other factors that can influence the degree to which public consultation has an impact. However, this party-mediation thesis suggests that the other variables at work here interact with party strength in such a way that strong parties essentially preclude significant influence from individuals in the constitution-making process and significantly lessen the influence of interest groups in the later stages of the process.

The book also makes a number of empirical contributions to comparative constitutional studies. As detailed later, the empirical chapters feature three main case studies that are based on field research and the collection of new primary source materials relating to the constitution-making processes of Brazil, South Africa, and Iceland. These three chapters provide a concise history of the participatory processes in these precedential cases, using new data to measure the precise effects of participation. This is an area of study where little has yet been done, and these chapters significantly advance our fundamental knowledge in this area. The empirical research in these chapters includes analyses of primary documents generated in the three constitution-making processes under study, such as internal documents from the constituent assemblies, minutes and transcripts of committee meetings, intermediate and final drafts of the constitutions, and written submissions from the public. This documentary evidence is supplemented by sixty-seven semi-structured interviews, most of which were conducted in person in South Africa, Brazil, and Iceland. It follows then that much of the analysis of these three major cases is of a qualitative nature. Where appropriate, computational methods of textual analysis are used. In the chapter on Iceland, an original dataset of submissions from the public is used to create a statistical model predicting the likelihood that these submissions would be included in the final draft of the constitution.

These chapters provide a clear answer to the first question posed earlier, and it is not necessarily an encouraging one. In this first large-scale comparative analysis of the impact of participation on constitutional texts, I show that it is highly unlikely that what citizens submit or propose will be included in the constitutional text. Even in a propitious context in which participation is solicited by leading politicians, many citizens respond, and professional teams of technicians carefully process these inputs and relay them to the drafters, public participation has precious little impact on the constitution. There is some variation between the cases, with Iceland appearing as a relative success, with almost 10 percent of the submissions making an impact. However, it bears repeating that the cases considered in this book were instances where public participation was far more likely to make a difference than in the majority of constitution-making processes. If South Africa's much lauded participation program had such a negligible impact on the constitutional text, we should significantly revise our baseline expectations for other cases. This creates a significant challenge to the conventional wisdom about public participation in constitution-making as described earlier.

Taking the analysis further, the fourth empirical chapter (6) includes sixteen more case studies of highly participatory constitution-making in cases across the globe. These vignettes provide a participation-focused account of a number of cases in which scholars have usually had other concerns. Using a variety of secondary sources, I am able to make connections between political parties and public participation across a wide variety of political contests. Finally, to provide a comprehensive view of this dynamic between political parties and public participation, I also

include statistical models that demonstrate the way in which the effects of participation depend on party strength. This statistical analysis includes data on all successful constitution-making processes between 1974 and 2014, testing the party-mediation thesis and the textual effects of participation at scale. While the underlying data in those models is not original, I employ a creative strategy to model the effects of participation that could spark new interest in analysis of participation's effects. Taken as a whole, the empirical chapters significantly advance our understanding of how public participation has performed in the real world.

#### 1.4 OUTLINE OF THE BOOK

The book proceeds by developing a theoretical account of participatory constitution-making, then exploring the facts of constitution-making in both case studies and cross-national statistical analyses, and concludes with a revised assessment of the role of public participation in constitution-making processes.

In Chapter 2, I introduce a theory of party-mediated public impact. As previously described in brief, this book advances a two-part argument, holding that public participation is unlikely to have a significant impact in constitution-making processes, but that this (small) impact varies with the strength of the political parties that are involved in the drafting process. This chapter reviews the state of our knowledge of constitution-making processes, political parties, and political participation through a conceptually oriented discussion. The chapter sets up the empirical work that follows by laying out some theoretical expectations about the interactions between public participation and political parties in constitution-making processes.

The three main case studies allow us to begin to assess the veracity of this theory with reference to the real experience of constitution-making. The case studies are arranged in an order that follows the central argument of this book. The first case study is South Africa, where we find strong parties and low impact from public participation. This is followed by the case of Brazil, where famously weak parties are associated with a middle level of impact. The final case is Iceland, where the constitution was drafted without the involvement of political parties, and the level of impact was high.

The basic intuition behind the selection of the first two cases is a search for most similar systems. Indeed, Brazil and South Africa share most salient features of the constitution-drafting process, facilitating an attempt to control for most institutional aspects of the constitution-making process, while varying the level of the main explanatory variable (party strength). Brazil and South Africa are in some more general terms well paired for a most similar systems comparative analysis, and have been used in that way in previous studies (Lieberman, 2003; Seidman, 1994). Beyond this, the cases are important to consider due to their precedential value as two of the earliest examples of highly participatory constitution-drafting (Galligan, 2013). Yet, there are important differences in terms of the larger historical context



that are relevant to the causal claims I make (Simmons and Smith, 2017). Iceland is in many ways less comparable to the other two cases. However, the inclusion of Iceland provides us with a more complete picture of the relationship between public participation and political party strength, as it is one of only a very few cases in which an officially sanctioned constitutional draft was prepared in a process that excluded political parties. In each of the case study chapters, I consider the political features that developed prior to the critical juncture of the drafting moment, identifying critical antecedents that shape the divergence between the cases (Slater and Simmons, 2010). Read together, the cases need not be compared in a direct way, but rather understood as examples of how the two primary explanatory variables (public participation and party strength) interact.

The discussion of South Africa in Chapter 3 includes an introduction to the legal context of the end of apartheid and the transformation of liberation movements into political parties. The chapter also includes a discussion of the 1994 election, including new evidence about the outcome gathered from high-level interviews. Primary sources were vital to the analysis here, including rarely reported internal documents from the Constitutional Assembly. Some of the most compelling support for the theory comes from interviews with drafters, including high-profile figures in the major parties and representatives of the smaller parties. Overall, while the South African constitution-making process was a great success (as is the constitution it produced), the analysis in this chapter demonstrates that the extensive public participation program had a negligible impact on the constitutional text. The constitution was instead the result of difficult negotiations between two strong parties.

Though including comparatively less history than the South African chapter, the discussion of Brazil's constitution-making process in Chapter 4 also takes care to develop a contextually rich account. The analysis in this chapter also relies heavily on primary sources, including a little-studied collection of almost 73,000 submissions from members of the public. These documents reveal patterns of participation, including several campaigns that provided sample text for citizen-participants. Interviews highlighted the differences between Brazil and South Africa, as drafters in Brazil placed much more emphasis on the role of individuals and groups in advocating for changes to the constitution. Brazil's constitution-making process was at times somewhat chaotic, but was characterized by creativity and a high level of participation from both individuals and public-spirited groups. This constitution-making process included a number of innovations, including the use of a computer database to organize submissions from the public and the creation of petitions for amendments during the drafting stage. The constitution that this process produced was influenced in several clear ways by input from the public, demonstrating the space that weak parties leave for effective public engagement.

Iceland's experience of constitution-making in 2011 was ultimately unsuccessful, but both the successes and failures of this case have a great deal to teach us about how public participation works in constitution-making processes. Chapter 5

provides a detailed and carefully researched account of this constitution-making process. As one of the smallest independent states, Iceland's constitution-making can be known much more thoroughly than that of Brazil or South Africa. This chapter again builds on primary documentary sources and interviews, but also includes a statistical analysis of the direct textual impacts of submissions from the public. This chapter demonstrates that, in a case where political parties are excluded from the drafting process, public participation is both more necessary and more effectual. Also 10 percent of the submissions from the public in this case resulted in a change to the constitutional text. The statistical analysis also highlights the fact that the part of the constitution dealing with fundamental rights was the most likely to be changed in response to public participation. This secondary finding is one of the sources of support for the cross-national statistical analysis in Chapter 6. While some might doubt the generalizability of the Icelandic experience, this unique case demonstrates the high level of impact that public participation can have in a constitution-making process that excludes political parties.

Going beyond the focused analysis in the three main case studies, Chapter 6 takes on the task of testing the party-mediation thesis in a robust and expansive way. This chapter begins with a large-N cross-national statistical analysis of the effects of public participation in constitution-making processes in almost all cases between 1974 and 2014. In this fourth empirical chapter, I test whether the findings of the three main case studies are generalizable to a near-comprehensive sample. While the careful measurement of impact that is featured in the case studies is not replicable on this larger scale, this chapter employs a creative strategy to overcome the data problem and quantify the impact of public participation in constitutional texts. The statistical models in this chapter highlight both the overall effects of public participation on the constitution and the role that party strength plays in this process. Specifically, the models show that the effect of public participation is dependent on party strength, with the impact of participation on the constitutional text dramatically declining as party strength increases. To take this finding even further, the chapter also includes sixteen case studies of the most participatory constitution-making processes between 1974 and 2014. These shorter case studies provide additional support for the argument advanced in this book, showing that party strength is a major factor in determining the extent to which input from the public will have an impact on the constitutional text.

The book concludes with a chapter that more explicitly unites the three main case studies and discusses the findings in a synthetic fashion. The concluding chapter also addresses other issues not covered in the previous chapters, including some policy guidance that flows from the central findings of the book. Moreover, this concluding chapter reflects on the implications of the party-mediation thesis for research on constitution-making processes, political parties, and democratic innovations.

Through this wide-ranging study of the relationship between public participation in constitution-making processes, I hope to re-calibrate our expectations and normative aspirations. The evidence presented here shows that we have over the past three decades developed a mythology of the role of “the people” in constitutional change, veiling the hard realities of partisan competition that actually characterize constitution-making processes. I hope the arguments and evidence presented here will push us to think more creatively about how constitutions can be written and the role of the people in politics more generally.